IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

SEABOARD AIR LINE RAILWAY, *Plaintiff-in-Error*, *v.* STATE OF FLORIDA, upon the relation of W. H. ELLIS, as Attorney-General, *et al.*	No. 155 and No. 156.

BRIEF FOR PLAINTIFF-IN-ERROR.

These cases are here on writ of error from mandamus issued by the Supreme Court of Florida in the exercise of original jurisdiction, and the parts of this brief not applicable to both cases will be distinguished as they are reached.

Appellant's railway system, which extends into six States and embraces 760 miles in Florida, yields income enough to pay the annual interest on its bonded debt, but as yet it pays no dividends to stockholders. The Florida portion of the road yields an income which is less by some $430,000 than its aliquot proportion of the annual interest on bonds for which it is bound, and yet the Florida Railroad Commission has made three several orders each reducing largely the intrastate freight rates on that road. One of these orders made December 22, 1903,

to go into effect July 1, 1904, reduced rates, as the report of the Commission told the people of Florida,

> "on every article of clothing, every article of household furniture, and everything we eat."

This was of course a general reduction and as stated by the Commission was a

> "saving * * * to the people of Florida."

From this we did not appeal.

In November, 1903, an order had been made reducing by 10 per cent certain freights going over two or more roads. From this we did not appeal.

Another order issued on June 25, 1903, to go into effect July 1, 1903, made reductions per 100 pounds, per ton, and per carload, distances graded from 10 to 400 miles, on what seems to be every possible class of freight shipped from or to points on the Florida West Shore Road, operated by appellant, and from this we appealed. This case is number 155.

Still another reduction was by order issued December 17, 1903, to go into effect January 15, 1904, requiring appellant to carry all the 250,000 tons of phosphate, intrastate, it was then carrying (and not carried as some of it was for less) at the uniform rate of one cent per ton per mile. From this order also we appealed and that case is number 156.

If this court sustains the court below then, by section 13 of the Railroad Commission law of Florida, for every failure of the appellant to comply with any requirement of either of the two orders appealed from the "injured person" may bring suit and recover damages, court costs and lawyers' fees. In other words, we are at the mercy of any "injured person" who, say, under the phosphate or-

der, has demanded of us to load and carry a ton of phosphate one mile and unload it for one cent, or load and carry it for five miles and then unload it, all for five cents.

The principal federal question in case 156 arises on the fourth and fifth assignments of error, which are in substance as follows:

Fourth. That the Supreme Court of Florida erred in adjudging that the rate on phosphate prescribed by the order of the Florida Railroad Commission was not unreasonable.

Fifth. And in deciding that the said rate prescribed by order of the Railroad Commissioners of Florida on December 17, 1903, on phosphates was not unreasonable, when taken in connection with the reductions of rates prescribed by said Railroad Commission on December 22, 1903, reducing merchandise rates on all articles of clothing, on bedsteads and bureaus, corn mills, cane mills, agricultural implements, lumber, bacon, corn, oats, rye, household goods, and live stock, as shown on pages 82 and 83 Rec.

This case involves directly only the order on phosphates, which was made December 17, 1903, and was to go into effect on and after January 15, 1904. The other order, to wit, that on merchandise, issued as above quoted on December 22, 1903, was to go into effect on July 1, 1904, and it is in effect now, the railroad not having resisted it. The two orders were parts of the same system, and both had been made applicable to the business of the plaintiff-in-error when the proceeding in this case was begun, March 7, 1904. The order of December 22, relating to general merchandise, was put in evidence without objection, and this was entirely proper inasmuch as the mandamus against the plaintiff-in-error is in the nature of a continuous and permanent order affecting the interests of the Seaboard Air Line Railway, not only from the

time when the petition for it was filed, to wit, on March 7, 1904, but also after July 1, 1904, when the order of December 22, 1903, was to go into effect.

Unfair Discrimination.

The evidence in the case shows that the Seaboard Air Line Railway Company is not paying any dividends to its stockholders and that its business in Florida is conducted at rates so low that any material reduction would be unreasonable, but before discussing the testimony we insist that—

(1) *The order of the Florida Commission in relation to phosphates is discriminatory, exceptional and partial as to the particular subject-matter. On its face it is an irregular, unjust and intolerable method of rate fixing.*

That order is as follows, see page 6, record of case 156:

> "It is, therefore, ordered by the Railroad Commissioners of the State of Florida, that the rate to be charged by all the railroads and common carriers doing business wholly or in part within the State of Florida, for the transportation of phosphate from points in the State to points within the State, shall not exceed one cent per ton per mile.
>
> "Provided, however, that where the rate of one cent per ton per mile will raise any rate now in operation, that said rate of one cent per ton per mile shall not be effective, but the rate as now charged by the railroad companies is hereby adopted by the Railroad Commissioners as their rate between such points."

This order makes the rate the same for one mile as for one hundred miles, and it is material because it applies to 16.43 per cent of all the intrastate freight business of the appellant company in Florida.

All railroad literature with which we are familiar, whether originating in discussions before legislative

bodies, railroad commissions, or courts, distinguishes between long and short hauls, since it is matter of common knowledge that no railroad carrier can transport freight at the same rate per ton per mile for long and short distances. Grading rates according to mileage may not, it is well recognized, secure perfectly fair compensation, but as the best and only practicable method of approximating justice we believe it may be called an unvarying custom.

It has been the custom of the Railroad Commission of Florida in other cases to follow this rule of grading rates with some reference to mileage as is shown by the record in both these cases. As an illustration, freights are graded on page 23 of record 155, and the lowest rate on a ton is "10 miles and under, 75 cents." The Commission, however, has selected phosphates to signalize a new departure from this just principle.

A railroad company may sometimes, for purposes of its own, do things which a commission can not be justified in ordering.

Louisville & Nashville R. Co. v. *Behlmer*, 175 U. S. 669–70.

Just such an order as this, however, we can not conceive that any railway company has ever prescribed for itself.

Phosphate mining is an important industry in Florida, and it appears from the reports (Rec. p. 75) that 16.43 per cent of the intrastate (Florida) freight carried by the appellant company is phosphate. Left entirely to conjecture, we guess that it was the desire on the part of the Commission to encourage the shippers of phosphate and the using of phosphate also by farmers that induced the Commission to select this article as the one commodity on which they would fix freight at one cent per ton per mile for short distances.

That it was the purpose of the Commission, while for-

mulating the order in general terms, to make it applicable only to hauls however short and to short hauls alone, thus making rates on phosphates discriminatory, partial and exceptional, conclusively appears from the following facts in evidence. On page 61A of the Record, item 17, under the head of freight traffic, the average rate per ton per mile (in Florida) is .815 of one cent; on the same page it appears, item 16, that the average amount received for each ton of freight hauled in Florida is $1.01.336; also in item 14, same page, that the average distance haul of one ton in Florida is 124.33 miles, from which we have this fact, which calculation from these figures verifies—that when the Seaboard Air Line Company hauls a ton of freight in Florida 124 miles, its average distance, its average charge is little over .81 of one cent per ton per mile. These rates, long and short hauls both considered, would seem to be quite reasonable. If it be urged that while this average includes phosphates, there is no proof that the charges on phosphates were not, when reduced, higher than on other freights, we answer by quoting the proviso in the order (p. 6, Rec.), as follows:

> "Provided, however, that where the rate of one cent per ton per mile will raise the rate now in operation, that the said rate per ton per mile shall not be effective but the rate as now charged by the railroad companies is hereby adopted by the Railroad Commissioners as their rate between such points."

This shows very clearly that the appellant company's rates on phosphates were, when altered, for long distances less than one cent per ton per mile, and more for shorter distances. If the rates between any points or for any particular distances were too high, the Board should have addressed itself to the task of reducing such rates, grading them according to distances; this because, as the

court judicially knows, short hauls and deliveries cost more than long hauls. In *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 168, Mr. Justice Brewer, delivering the opinion of the court, says:

> "It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight."

The authorities quoted in the brief of appellee are numerous, and indeed the line is unbroken to show that the decisions of the Supreme Court of a State construing and applying State statutes are not reviewable by the Federal Supreme Court; but they all have this limitation—they do not apply where a federal question is involved. In this case, for example, suppose the Supreme Court of Florida to have entirely disregarded, as it certainly did, the following provision of the Florida law contained in section 8, chapter 1700, number 39, of what is called the Railroad Commission law of 1899:

> "Said Commissioners in changing, revising, fixing, allowing or adopting any schedule of rates for freights or cars shall not discriminate unreasonably or unjustly in favor of any one class of freight to the detriment of other classes of freight."

Such disregard of its own laws by the State court is not reviewable here, except in so far as this statute has laid down a rule of conduct for the guidance of the Florida Railroad Commission which accords with the rules of fairness and justness which the Constitution of the United States requires to be observed by all railroad commissions.

Again, the same section of the Florida Railroad Commission law prescribes that

> "All rules and regulations made and prescribed by said Commissioners for the transportation of persons and property on the railroads subject to the provisions of this act or to prevent unjust discrimination or other abuses by them shall be deemed and held to be *prima facie reasonable and just*."

Now suppose the Commission to have made a freight rate which, on its face, is *prima facie* unreasonable and unjust, certainly the Supreme Court of Florida could not take away from this court the right to pass upon this question by declaring that said rates were just and reasonable. If the Florida court had any such power as this all questioning of the conduct of a State commission would end with the State courts, and there would be no such thing as federal jurisdiction over cases of this class. Take the case at bar and apply the principles we have been discussing.

Suppose the Florida State Commission to have conceived the idea that all phosphates mined in Florida ought to be utilized in fertilizing the lands of that State and that in furtherance of this idea the Commission had declared that phosphate rates for all distances in Florida should

be one-quarter of one cent per ton per mile. This would be a more startling application of the idea the Commission has acted on, but it would not differ in principle from the rule of one cent per ton per mile. The only difference would be that applying one quarter of one cent per ton per mile to all phosphate rates would be a discrimination as to phosphates for all distances, whereas one cent per ton per mile is a discrimination as to phosphates for all hauls, for which the company had previously charged more than one cent per ton per mile.

Again, suppose the Florida Commission, disregarding the instructions contained in section 6,

> "to make reasonable and just rates of freight and passenger tariffs"

instead of grading rates according to distances and thus having regard to the expenses incurred by railroads in transportation had, after looking at the average rates per ton per mile of freights in Florida, fixed .81 of a cent as the charge to be made for all freights, all distances, in the State of Florida. This would be unjust and unfair because, as has often been decided, freight rates must bear some approximately just proportion to the expenses incurred by the railroads. Such a rule, .81 of one cent for all distances, under conceivable circumstances, might work to the advantage of a carrier, and yet the court would not for a moment stop in such a case to work out the proposition as to whether the carrier would make or lose by it, but would unhesitatingly, as we think, declare the rating void, and this not because the result of such fixing of rates would be a loss to the carrier, *but for the reason that such a haphazard rule proceeded upon no fair or equitable principle that could be sustained in a court of justice.* If this would be the decision of the court in case the Florida Commission had fixed all rates for all distances

at the same figures, *a fortiori*, such must be the decision where a commission in violation of the rule laid down for its governance in the act creating it and forgetful of all considerations of expense and inconvenience to a carrier, has selected one commodity for a discriminatory straight freight rate; and here we call the attention of the court to the fact that the argument against this particular rate in no manner depends upon the extent of the reduction which has been made by the Florida Board on phosphate rates. That the order does make a reduction is apparent on its face; that was its avowed and only purpose. The extent of that reduction is not the question. The objection to the order is that it is unfair, exceptional and discriminatory.

We have found no case in which such a sweeping straight rate as this has been sustained. Indeed, we have discovered nowhere any instance where any board has ventured upon the adoption of such a rule. Such rating may gratify the constituency of a State Board. If upheld now, the decision will greatly simplify the duties of State boards in the future, but the rule here laid down seems to us to be totally inconsistent with the ideas of equity and fair play heretofore exacted of all bodies entrusted with the delicate and difficult task of dealing with the property rights of others.

In *Lake Shore* v. *Smith*, 173 U. S. 695, 696, it was said that even admitting that the Michigan legislature might have reduced all passenger rates to two cents per mile, it had no right, a general rate of three cents per mile having been allowed, to reduce such rates in special cases to two cents by an enactment that was "discriminatory, exceptional and partial" in favor of "persons able and willing to purchase a quantity at one time."

The order of the Board must be taken as a whole, and if in any part of it it is unjust and without warrant, the whole

must fall. It is no answer to say, as the Florida court says, erroneously, as we shall hereafter show, that there is no proof that freights are "carried locally." No proof is needed. The Board has made an order that covers such carrying, and it is not to be presumed in favor of the validity of the order that it is nugatory. Shippers may hereafter, even if they have not heretofore done so, in good faith at any time offer such freight, or they may even offer it to *secure the penalties* accruing to them by section 12 of the Florida Railroad Commission act—where a railroad company refuses to comply with an order of the Railroad Commission.

The Commission made this unfair order. There was no reason why it should not have made it just and fair. As this court said in *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S.:

> "As we have seen it is not the function of the courts to establish a schedule of rates. It is not therefore in our power to establish a schedule or *rearrange* this. Our inquiry is limited to the effect of the tariff as a whole including therein the rates prescribed for all the several classes of goods [and we insert here "including the rates prescribed for every distance embraced in the schedule"] and the decree must either condemn or sustain this act of quasi legislation."

On page 188 of its opinion in the case of *Ames* v. *Union Pacific Ry.* (C. C.) 64 Fed. Rep. the court said:

> "If it would be unreasonable to reduce the total earnings of these roads 29½ per cent it is, *prima facie*, at least unreasonable to so reduce any single fractional part of such earnings."

This *prima facie* case against the order shifts the burden on to the Florida Board.

The Supreme Court of Florida saw this difficulty and disposed of it by saying:

> "There is no showing that phosphate is *carried locally*, nor what may be charged for shipping the commodity in interstate commerce.

The court seems to have overlooked the proof on page 95 of the record, that during the preceding year the appellant hauled from points in Florida to points in Florida 295,107 tons of phosphate. To justify the sweeping order before it, the Florida court, if it had had these freights in mind, would have been obliged to assume without proof that in all this vast amount of intrastate freight there had been no short hauls in the previous year and would be none in future, *notwithstanding the inducements held out to shippers by this extraordinary order of the Commissioners.*

In Mississippi the State Railroad Commission sought to compel a telegraph company to keep open a particular office as part of a system, but the Supreme Court of that State held that the company could not be compelled to do business at a loss even in that one little office.

W. U. Tel. Co. v. *Railroad Commission*, 74 Miss. 80.

Capitalization, Mileage, Operation, etc.

The testimony in this case consists entirely of the report made by the plaintiff-in-error, the Seaboard Air Line Railway Company, to the Florida Railroad Commission, for the fiscal year ending June 30, 1904, and the seventh annual report of the Florida Commission. These two reports were submitted by the appellant as evidence and were specifically named as the evidence on which the case was to be tried by order of the court, record in 156, p. 31. A similar order was made in the other case, record, p. 41. There are also in the pleadings the two orders of the Florida Railroad Commission, one, that herein complained of reducing the rates on phosphates

in the State of Florida to the rate of one cent per ton per mile for all distances; and the other, the order of the Florida Railroad Commission above referred to making reductions on the merchandise therein mentioned.

The annual report of the plaintiff-in-error was made as called for under sections 10 and 20 of the Florida Railroad Commission law of 1899. It is full and complete, showing in detail—mileage of the whole system, 2,610.97 miles; mileage in Florida, 760.32 miles; capitalization, funded indebtedness, stock, preferred and common; expenses of operation; gross and net earnings, as to the whole system and as to Florida specially, as well as every other possible detail that might in the judgment of the Florida Railroad Commission enable it to determine upon proper rates; and all these statements are made with such particularity of detail, we insist, as to enable this court to decide the questions put in issue by our assignments of error.

The following extracts from this report are material:

Capital stock. (Page 50, Record.)

Number of shares authorized.	Par value of shares.	Total par value authorized.	Dividends declared during year.
Common 375,000	$100 00	$37,500,000 00	
Preferred . . . 250,000	100 00	25,000,000 00	None
Total 625,000	$100 00	$62,500,000 00	None

Number of shares of stock issued for construction .	2,000
" " " for acquiring securities of proprietary companies	623,000
Total number issued	625,000

Recapitulation of funded debt. (Page 54, Record.)

Class of Debt.	Amount Issued.	Amount outstanding.	Interest.	
			Amount accrued during year.	Amount paid during year.
Mortgage bonds (page 51, R.) . .	$65,493,000 00	$43,075,000 00	$1,994,733 33	$1,994,733 33
Miscellaneous obligations (p. 51, R.)	15,000,000 00	15,000,000 00	552,083 33	500,000 00
Income bonds (p. 51, R.)				
Equipment trust obligations (p. 51, R.)	6,380,738 80	3,442,347 89	136,632 29	135,210 07
Total . . .	$86.873,738 80	$61,517,347 89	$2,683,448 95	$2,629,943 40

Recapitulation for mileage operated by road making this report, the operations of which are included in the income account. (Page 55, Record.)

Name of road.	Capital stock.	Funded Debt.	Total.	Amount per mile of line.	
				Miles.	Amount.
Seaboard Air Line Ry.					
Grand Total	$62,500,000 00	$61,517,347 89	$124,017,347 89	2,607.97	$47,553 21

Cost of road, equipment, and permanent improvements—totals. (Page 57, Record.)

		Cost per mile.
Total cost equipment to June 30, 1904 (page 57, R.)	$7,443,639 88	$2,914 22
Total cost construction to June 30, 1904 (page 56, R.)	46,303,984 67	18,323 96
Grand total cost construction, equipment, etc., to June 30, 1904 . . .	$54,247,624 55	$21,238 18
Grand total cost construction, equipment, etc., to June 30, 1904, State of Florida	$15,666,713 97	$20,605 42

Income account (for roads making operating reports). (Page 59, Record.)

Total income (whole line)	$3,678,654 26
Total deductions from income	3,384,359 62
Net income	$294,294 64

Earnings from operation, State of Florida. (Page 61, Record.)

Total passenger earnings	$839,229 34
Total freight earnings	1,960,731 86
Total passenger and freight earnings	$2,799,961 20
Total other earnings	46,843 87
Total gross earnings from operation, State of Florida	$2,846,805 07

Operating expenses, State of Florida. (Page 66, Record.)

Maintenance of way and structures	$427,850 16
Maintenance of equipment	418,122 10
Conducting transportation	1,386,641 18
Gefleral expenses	142,513 14
Total operating expenses, State of Florida	$2,375,126 58

Total gross earnings from operation, State of Florida	$2,846,805 07
Total operating expenses, State of Florida	2,375,126 58
Surplus	$471,678 49
Taxes for the year on the railroad property in Florida (page 78, R.)	125,594 56
Surplus	$346,083 93
*The Florida road's part of the accrued interest on the funded debt, apportioned by size and cost of construction of the Florida road to that of the whole line	$774,701 81
Deficit for year	$430,636 88

*This statement is not from the report but is a deduction of our own and is hereafter explained.

This official report is uncontradicted. Every statement in it therefore stands before the court not only for what it states but for every inference to be legitimately drawn therefrom. There is no evidence offered to suggest that the construction of the road did not cost every cent as claimed, or that it is not worth the sum at which it is capitalized. Altogether the Seaboard Air Line Railway constitutes a great system extending with many branches through Virginia, North Carolina, South Carolina, Alabama and Florida. Its present funded debt amounts in round numbers to some $61,000,000 besides its stock; whereas its total cost of construction is given in round numbers at some $7,000,000 less—$54,000,000. But this is by no means proof of overcapitalization. The fair conclusion is, there being no evidence to the contrary, that the system as a whole is worth not only the amount it actually cost in dollars and cents to construct and equip it, but the amount it cost its owners and at which it was capitalized; because, like other great systems of railways, it was extended into an undeveloped country and over desirable lines, upon the credit of the company, the company utilizing its credit by raising money on its *bonds*, which money was used in buying and building connecting roads, in operating them for a considerable period of time, during which they did not and could not be expected to pay interest on the money invested, the enterprising managers of thesystem in the mean while counting on the future development of the country for a return of their investments.

On this point we call particular attention to the following reasoning of Judge McCormick in the case of the *Met. Trust Co.* v. *The Houston & T. C. R. Co.* 90 Fed. Rep. 168. It will be observed that in this Texas case the question was as to the proper valuation to be placed upon the property of the road whose case was before the court. In

that case there was a very wide difference between the proof offered by the railroad company on the one hand and the Railroad Commission of Texas on the other. The railroad authorities valued their road at $62,000 per mile. The Railroad Commission valued it at $21,000 per mile. Here was a positive conflict, and the difference between the witnesses was $41,000 per mile. If the Florida Railroad Commission had offered any testimony in this case showing, or tending to show, that the Seaboard Air Line Railway Co. was over-capitalized, that its property, considering its present and prospective value, was less than its capitalization, this case and the case before Judge McCormick would be precisely on all-fours with each other.

But the Florida Commission has offered no evidence whatever; so that our figures stand for all they are worth, and therefore when we apply the principles so ably laid down by Judge McCormick to the testimony before the court, the finding must be that the Seaboard Air Line Railway is not over-capitalized.

This is what Judge McCormick says in the above cited case:

> "The bill in this case avers that the defendant company and its predecessor company have necessarily expended in cost in the construction and equipment and betterment of the lines on the defendant company about $62,000 per mile of its said railways; * * * The valuation placed upon the property of this railroad corporation by the Railroad Commission of Texas, is, in round numbers, $21,000 per mile. This statement shows the vast difference between the estimates made by and on behalf of the railroad company and the estimates made by the Railroad Commission of the value of the railroad's property on which it is entitled to earn some profit. It seems to be clear from the answer of the Commission, the tone of the affidavits which it offers in support of its answer, and the argument of the attorney-gen-

eral and the assistant attorney-general who represented it on the hearing, that in estimating the value of this railroad property no allowance was made for the favorable location of the same, in view of the advance in prosperity of the country through which it runs, and the increment to its value due to the setling, seasoning, and permanent establishment of the railways, and to the established business and good will connected with its business, which has been established through a long series of years, and all of which ought reasonably to be considered in fixing the value of the property and the capitalization upon which at least it is entitled to earn, and should pay some returns by way of interest or dividends. * * * In countries conditioned as Texas has been and is, such a railroad property and business can not be reproduced, except substantially in the same manner in which this has been produced; that is, by a judicious selection of location, by small beginnings and gradual advance through a number of years, more or less of unproductive growth. * * * It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the Commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provisions of the fourteenth amendment to the Constitution of the United States, which forbids that a State shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not im-

providently constructed, and not improvidently operated may not be able, while charging reasonable rates for carriage of freight to earn even the necessary running expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time after the opening of the roads for business. This is true now of some of the roads, parties to these bills. At one time or another, and for longer or shorter times, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitation of the various communities through which they run, and by various encouragements offered by the State. The Commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the "period of construction" mentioned is probably limited to the time when each section of the road was opened to the public for business * * * The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists to-day, may not be exactly accurate—clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist to-day as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the service is rendered, can not be reduced by the force of State law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners

thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited."

In estimating the value of the property on which a railroad company is entitled to earn a return from tariff rates, the following authorities show that the cost of bare physical reproduction is too narrow a basis:

Milwaukee Electric R. & Light Co. v. *Milwaukee*, 87 Fed. Rep. 585.
Ames v. *Union P. R. Co.* 64 Fed. Rep. 165.
Smyth v. *Ames*, 169 U. S. 547.
Chicago, B. & Q. R. Co. v. *Dey*, 38 Fed Rep. 656.

The following authorities are cited to show that railway companies should be allowed to earn something by way of dividends in addition to paying operating and maintaining expenses, interest on outstanding bonds, and taxes:

Chicago & N. W. R. Co. v. *Dey*, 35 Fed. Rep. 866.
Reagan v. *Farmers Loan & Trust Co.* 154 U. S. 362.
Milwaukee Electric R. & Light Co. v. *Milwaukee*, 87 Fed. Rep. 577.
Louisville & N. R. Co. v. *Brown*, 123 Fed. Rep. 951.
Ames v. *Union P. R. Co.* 64 Fed. Rep. 165.
Smyth v. *Ames*, 169 U. S. 547.
Southern Pac. Co. v. *Railroad Comrs.* 78 Fed Rep. 236.

Mr. Justice Brewer, delivering the opinion in *Chicago & N. W. Ry. Co.* v. *Dey*, *supra*, says:

"But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates. Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping of the road-bed

and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers and pay the price needed to obtain them. The same rule obtains as to engines, machinery, road-bed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public. The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders can not be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which can not be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature can not destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is mortgaged. It can not interfere with a contract between the company mortgagor and the mortgagee or reduce the stipulated rate of interest, and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagors' rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible,—and that power of the legislature over

> property is conceded,—yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."

In *Southern Pac. Co.* v. *Board of Railroad Commissioners*, 78 Fed. Rep. 263, Mr. Justice McKenna says:

> "Interest on bonded debt is held by all authorities to be a proper charge upon income," etc.

In the case of the *Milwaukee Electric Railway & Light Company* v. *The City of Milwaukee*, 87 Fed. Rep. 577, the syllabus is:

> "An ordinance requiring a street railroad charging 5 cent fares to sell six tickets for 25 cents, or 25 tickets for $1, is unreasonable, when the road is only making yearly net earnings of 3.3 per cent to 4.5 per cent on its *bona fide* investment, and paying 5 per cent interest on its bonds in a city where the current rate of interest on first mortgage real estate security is six per cent. Such an ordinance is void, under the fourteenth amendment, as depriving the company of its property without due process of law."

In his opinion, page 585 of the case, District Judge Seaman said:

> "I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding $5,000,000. ($5,153,287.76, being the amount which witnesses for the railway stated as the reproduction value of the railway.) And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which

were indispensible to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. * * * Of the $5,000,000 and over paid for the acquisition of the old lines it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly $9,000,000. How much of this may be defined or apportioned as the amount which was both 'really and necessarily invested in the enterprise' I have not attempted to ascertain, except to this extent: that I am clearly of opinion that at least $2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in reference to the remaining $1,885,644."

In the case of the *Southern Pacific Co.* v. *The Board of Railroad Commissionars*, Federal Reporter, Vol. 78, Mr. Justice McKenna, delivering the opinion of the court, on page 203, after having shown that there was a "deficit for 1895 from the operation of the roads entirely in California of $552,896.51," says:

> "From this showing it is perfectly evident that there should be *no reduction of rates* of the Southern Pacific Company either regarding the Pacific Company or the California roads unless its business increase."

That is our precise contention here. We insist that the Florida Railroad Commission had no right to make any material reduction in our rates when it had before it appellant's actual condition. That condition it must have known,

as the law of Florida has required reports since 1899 like the report in evidence for the year ending July 1, 1904, and this report shows, as we have demonstrated, that upon a reasonable computation there was, when the earnings of the road in Florida were applied to the extinguishment of its fair share of the interest on the road's bonded debt, a deficit of $430,636.88. And yet so heedless was the Commission of the rights of appellant that it not only issued the phosphate order, the injustice of which we have complained, on December 17, 1903, but five days afterwards, December 22, it issued another order which had been under consideration since the 17th day of November, making a general reduction on rates of merchandise of which it said in its report, see page 82 Rec.:

> "The reduction in merchandise rates, while it may seem small when considered in relation to any one article, yet when we consider that it affects every article of clothing, every article of household furniture, and everything that we eat, it can be readily seen what a saving it will be in the aggregate to the people of Florida in the course of the year."

When the court considers that this order last cited is now in effect and that it is an additional and large reduction, we submit that it is clear that the enforcement or any further reduction would be depriving us of our property against the provisions of the fourteenth amendment.

The court will here note that the Commission is careful to explain that while the reduction "may seem small" yet, that for reasons given, it really amounts to a large sum; and that the Commission was right in this the court will see for itself from the following extract from the report:

> "In our last annual report we stated in detail the steps that were taken by the Commission in order-

ing into effect a reduction on merchandise rates, to be operated by the Seaboard Air Line and Atlantic Coast Line railroads. The Commission's order required that this rate should become effective July 1, 1904. *At the appointed time the railroads put the rate into operation.*

"This reduction affected a large part of all the freights hauled by the Seaboard Air Line and Atlantic Coast Line railroads in Florida. For distances of 150 miles and over 140 miles the reduction on such articles as shoes, books, medicines, not otherwise specified, and mowing machines was 10 cents per 100 pounds. On bedsteads and bureaus, 7 cents per 100 pounds; on corn mills and cane mills, hoes and plow handles, 3 cents per 100 pounds; on brick in less than carload quantities 8 cents per 100 pounds, and on lumber in less than carload quantities, 4 cents per 100 pounds; on bacon and hams packed in wood, 1 cent per 100 pounds; on flour 4 cents per barrel; on household goods and live stock, $3.00 per carload.

"The above is given to show how the reduction affects a few staple articles for a certain distance. The reduction is about the same for all distances between points on the lines of the above named railroads, *and affects practically all articles in less than carload quantities*, and a few in carload quantities."

Interest on Funded Debt—How Related to Earnings in Florida.

Before undertaking to discuss the opinion of the court below which totally omitted all considerations of indebtedness we shall insist under the authorities quoted that no calculations can be made about dividends until interest charges are all provided for. The total gross earnings from operation in the State of Florida for the year ending June 30, 1904, were $2,846,805.07 (page 61, Rec.), and the total operating expenses, in which were included the maintenance of way and structures, maintenance of

equipment, and conducting transportation, for the same period were $2,375,126.58. This leaves the earnings of the road in Florida $469,678.49, from which deduct taxes in Florida, $125,594.56, making the earnings $344,064.93, the whole of which was, if needed, applicable primarily to the payment of the yearly interest on the funded debt. To apportion this debt between Florida and the remainder of the system no plan seems so fair as apportionment according to the relative cost of the road in Florida and of the remainder of the road.

The total cost of construction, equipment, etc., of the whole system, is given at $54,247,624.55; the aggregate cost of the road in Florida is $15,666,713.97. That is to say, the value of the road in Florida, cost of construction alone considered, is 28.87 per cent of the whole. The interest on the funded debt, for which debt the whole of the road is bonded, is $2,683,448.95. The road in Florida must in equity have paid its share of that interest on the funded debt, which is 28.87 per cent. of $2,683,448.95, or $774,701.81. If we set over this last amount against the earnings in Florida, $344,064.93, we find that the Florida business fails to pay its share of the interest on the funded debt, the result being a deficit for the year of $430,636.88. And this does not take into account certain minor expenses deducted from the income of the whole road (page 59, rec.), amounting to $118,010.78, which was not apportioned as to States.

In calling attention to the bonded indebtedness which covers the whole Seaboard Air Line system and for which all the income of the road is bound, both interstate and intrastate, we are not unmindful of the principle laid down in *Smyth* v. *Ames*, 169 U. S. 541:

> "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and

> property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business."

We have already quoted authorities showing that a railroad company must be allowed to earn annual interest on its reasonable indebtedness and we have quoted the testimony showing that very nearly all appellant's total income, which is the aggregate of all its interstate and intrastate commerce, is required to pay this annual interest. This being true, it is impossible to avoid the conclusion that some portion of the intrastate commerce of Florida must be applied to the payment of this aggregate indebtedness. The Florida Commission can not say that the intrastate commerce of either Georgia, Alabama, North Carolina, South Carolina, or Virginia shall bear more than its proportionate share. Neither can it say that the interstate commerce of the whole road shall bear the whole burden, or shall bear more than its share. The principle laid down in *Smyth* v. *Ames*, which we have quoted, would forbid any such contention. Nevertheless, the debt must be paid, and the whole, or if that be not necessary then some part of the gains from the intrastate commerce of Florida must go to the satisfaction of the aggregate debt for which the whole system is bound. There might arise some difficulty in apportioning to the intrastate commerce of Florida its fair share of this debt if the earnings of the whole system were sufficient to leave a large surplus. In that case an ingenious argument might be made perhaps

on behalf of the Florida authorities to the effect that the earnings from interstate commerce should bear the whole burden of the debt. But we are saved the necessity of answering any such plea as this because the annual interest on the bonded debt of the system absorbs practically the aggregate of all the earnings of the road *on its State and intrastate commerce. To pay this debt all the earnings of the system from all sources are absorbed save the relatively pitiful sum of $294,000.* The demand of this debt is inexorable. It must be paid. And when it is paid there is left for adjustment and apportionment by the authorities of six different States and the Interstate Commerce Commission at Washington, only this $294,000 surplus over debts, which, if it were divided equally between all the seven parties to the dispute, would give only some $40,000 to each. These considerations justify us in saying, we think, that when the Florida Railroad Commission was fixing intrastate freight rates it should at least have considered that even if the creditors of the Seaboard Air Line Railroad Company were not entitled to insist that the domestic commerce of Florida should yield to them in satisfaction of their debt the whole of the $774,000 which we have apportioned to them in our previous calculation, they were nevertheless entitled to insist that before calculating what *dividends* it would yield to stockholders, the Florida authorities ought to have remembered that the share of the debt due from the road in Florida was far more than the $346,000 it earned.

In other words, what we insist on is that as the funded debt which binds the whole road absorbs practically all its earnings, and as this debt must be paid, and as the earnings in Florida are very much less than the share that would be apportioned to Florida according to cost of construction, the fair conclusion must be that after the payment by the Florida road of its share of the bonded

debt interest there would not be a dollar left over. On the contrary there would be left a considerable deficit. The fact of this deficit might not be sufficient to show that rates in Florida were actually lower than in other States, but what the calculation does show beyond all doubt is that the operation of the road in Florida is not as profitable to the company, mile per mile, as is the operation of the road in other States.

Again, however, suppose the bonded indebtedness of the road be left entirely out of consideration. The earnings of the road in Florida even then would only pay some 2.2 per cent on the cost of construction. These are the figures:

Total gross e...nings from operation State of Florida (page 61, rec. 156)	$2,846,805.07
Total operating expenses, State of Florida (page 66, rec. 156)	2,375,126.58
	$471,678.49
Taxes on railroad property in State of Florida (page 78, rec. 156)	125,594.56
Earnings in Florida	$346,083.93
Total cost of construction, equipment, etc., road in Florida	$15,666,713.97

The Supreme Court of Florida, leaving out of consideration entirely the bonded indebtedness, which was in evidence before it, calculated that the net earnings on the total cost of construction, equipment, etc., was 3½ per cent. We fail to see how it could reach that conclusion, unless it omitted from its calculation the $125,000 of Florida taxes (see page 78, rec.) and which should be deducted from what the court called net earnings. This would bring the calculation down to 2.2 per cent, bonded indebtedness not being considered. This per cent will be further reduced in the future if the reductions made

by the orders in question in these two cases are sustained by this court.

Case No. 155.

In this case the order from which we appeal is found on pages 3 and 4 of the record. The enforcement of that order we resisted in the court below on two distinct grounds:

1. That the Florida West Shore Railroad was not operated by the Seaboard Air Line Railroad Company in such manner as, under the laws of Florida, would justify the Railroad Commission in treating the two railways as one under the Florida statute. This ground of objection, after careful examination, we have decided not to insist upon here.

2. The other ground on which we objected was the same as that upon which we are resisting the execution of the phosphate order, case 156, in so far as relates to the contention that by reducing our earning capacity it was depriving the appellant of its property without due process of law. The testimony on this point applying to these two cases is substantially the same. In both cases we submitted our annual report for the fiscal year ending June 30, 1904, and the seventh annual report on the Florida Commission; therefore all the testimony from these records heretofore pointed out and commented on in the one case and all the authorities not specially applicable to the straight rates on phosphates apply with full force in the other case. Capitalization, mileage, operation and income intrastate and total, insufficiency of revenue to pay dividends, all are fully set forth.

The order reducing freight tariffs in this case is found ou pages 8 and 9 of record 155. No proof was offered to show that this particular order was justifiable because these particular freights were unreasonably high. Just

at this point, however, we encounter the presumption which, according to the statutes of Florida and perhaps according to common usage generally arises in favor of the reasonableness of rates fixed by Commissioners. This presumption, though it exists, is always rebuttable and never conclusive. In the case of the *Southern Pacific Company* v. *The Board of Railroad Commissioners*, 78 Fed. Rep. 236, Mr. Justice McKenna held that the provision of the Constitution of California making rates fixed by its Railroad Commission conclusively just and reasonable is in conflict with the fourteenth amendment to the Constitution of the United States, and void.

Lawson, in his work on Presumptive Evidence, states as rule 120:

> "A rebuttable presumption of law being contested by proof of facts showing otherwise, *which are denied*, the presumption loses its value, *unless the evidence is equal on both sides*, in which case it should turn the scale."

See also *Graves* v. *Coldwell*, 90 Ill. 615.

Now we think we have established (1) that the appellant's property was not earning sufficient revenue to enable it to pay any dividends whatever to its stockholders. (2) That the stockholders are entitled to some dividends if they can be fairly earned. And having established these two points the burden of proof is shifted to the shoulders of the Florida Commission. If they had reduced only freights on a few articles the presumption might still be with them, viz: that they had found these items too high. But where they have made what amounts to a general reduction, even though it applies to a part of our territory, we insist that we have fairly met them and shifted the burden of proof by showing that our rates are as a general rule so low that we are paying nothing to our stockholders. It will be seen by the pleadings that the reasonableness of

the reductions made was directly in issue. Under the rule of law as above laid down we admit that the reductions made by the Commission will stand unless the proof taken altogether preponderates in our favor.

To consider that evidence and weigh it. The reductions made in this case are shown by the local mileage tariff adopted on the 25th of June, 1903, by the Commission and set forth at length attached to page 3 of the record, the bottom of the page (mileage tariff), being marked 23. This prescribes a tariff for distances varying from 10 to 400 miles, per 100 pounds, per barrel, per ton and per carload on classes which would seem to cover all kinds of freight, though we have no key to it. The table is comprehensive and the mileage extends all over the State. Exactly how great the reduction is it makes, we do not know, but that it was a reduction and a material reduction is clear from the fact that it was made as such and resisted as such and that the appellant is still refusing to obey said order on this ground. From the recitals in the pleadings in paragraph 8, beginning at the bottom of page 15 in this record, it appears that the West Shore Railway is about 60 miles in length. This little road is the starting and the ending point of the reduction—nothing more. The schedule fixes rates from and to all points on this 60 miles of railway to and from the boundaries of the State, 400 miles and over. This necessarily materially affects transportation over all other parts of appellant's system in Florida on freights emanating from or destined to this little road. It would cover freights that traveled only one mile on the West Shore Railway and over 400 miles on the other parts of the roads of appellant's system in Florida; and this order is simply a part of a system of wholesale reductions made by the Florida Commission on the domestic traffic of appellant in Florida. On page 95 of this record the Commission

reports the issuance, in November, 1903, of their order No. 35, amending rule 19, fixing rates on freights passing over the whole of two or more roads not under the same control, and of this order the Commission says, page 96, record:

> "This reduction will amount to a large saving in freight charges to the people of the State."

On the same page the Commission states,

> "the raising of interstate rates has been general over the United States."

This no doubt results from an increase of wages which applies everywhere, but the Commission adds, as to Florida,

> "Local rates have not been raised, and in many instances during the past year have been materially reduced."

All these facts, we insist, show that the Florida Commission, by making the sweeping order establishing the local mileage tariff complained of in this case, has deprived the appellant, whose rates were already insufficient to pay any dividends to its owners, of its property under the Constitution of the United States.

In the opinion of the court below on page 34 of the record it is said:

> "The original return goes farther and includes with the cost of construction and maintenance the payment of fixed charges, which counsel admitted in argument means taxes and interest on outstanding bonds. The vice in this method of pleading lies in the fact that the question of reasonableness is made to depend upon the capacity of the rates to yield a net income over and above the cost of constructing and maintaining the road and the payment of fixed charges, whereas circumstances *may exist* [italics ours]

> under which rates are reasonable which do not afford a net income above the cost of operation and taxes, or the cost of operation, taxes and fixed charges."

Here the court contents itself with answering the claim that the owners of appellant's property are entitled to some return therefor by saying that

> "circumstances *may exist* under which rates are reasonable which do not afford a net income over the cost of operation and taxes, or the cost of operation, taxes and fixed charges."

But the court nowhere undertakes to show that such circumstances do exist in this case. The testimony before the court authorized, as we have endeavored to show in a previous part of this brief, no inference whatever that any such argument was applicable here. Appellant's road is capitalized at $47,553 per mile (page 55, rec.). This includes sixty-two and a half millions of stock. In the Texas case from which we quoted the opinion of Judge McCormick, the court found that the road in that case, built and operated very much as ours was and is, was reasonably worth some *sixty thousand dollars per mile*, and this in a case where the Texas Railroad Commissioners offered evidence tending to show that their valuation of $21,000 per mile was correct. In our case, without any proof attacking our figures, we find the Florida court presuming, as the basis of its opinion, that our road may have been over-valued.

The court nowhere in its opinion undertook to say that there was anything in the circumstances of this little sixty miles of road operated by appellant or in the conditions surrounding it, or in the freights that had been previously charged on merchandise shipped to it, or from it that would justify the Commission in making the existence of such a road or appellant's connection with it the

basis of a general reduction in all freights all over the State that might happen to be directed to it or might emanate from it. We admit that the court, however, is not to be criticised for this omission because there was nothing in the testimony that would have justified any such comment by the court, and this for the very good reason that the Commission, which was a party to the case, had not offered any testimony whatever bearing on the point.

It is certainly carrying the presumption in favor of the action of the Commission a long way to say that because of the existence of such a little piece of road as this, which is less than one-twelfth of appellant's Florida system, the Florida Commission is presumably justified in making a sweeping wholesale reduction of freights that is applicable to the whole of the other eleven-twelfths of the system, provided these freights travel over ever so small a portion of the West Shore Railway. And we respectfully submit that the evidence we have before the court, which is all the evidence bearing on the case, is amply sufficient to justify us in contending that the order complained of is taking away our property without process of law and contrary to the provisions of the fourteenth amendment.

We further insist that the local mileage tariff in this case adopted on the 25th day of April, A. D. 1903, was not a necessary or proper measure, as it is claimed it was (see pp. 6, 7 and 8, Rec.), to prevent the violation of the statute of Florida, which enacts that connecting railroads under control of one and the same company shall be considered as constituting one and the same road, but that it was—

An arbitrary, partial and discriminatory reduction of tariff rates, applying not to the whole of appellant's system in Florida, but to a part thereof.

A simple order by the Florida Railroad Commission, to the effect that it had found that the Florida West Shore Railway, as controlled by the Seaboard Air Line Railway, constituted a part of said Seaboard Air Line Railway, and that the freight rates of the latter should be computed upon that basis, no higher rates being charged thereupon than upon lines connecting therewith for similar distances, or some other like order, would have carried out completely the intent of the Florida statute. Instead of such an order, a tariff was adopted effecting a complete and general change of tariff rates on freights pointing to or emanating from the Florida West Shore Railway. This tariff on its face has no reference to former rates. There is no limitation in this order 25 providing that the rates established thereby shall not be lower than similar rates on other like portions of appellant's road, and this for the reason that the new rates established were intended to be, and were, a reduction of rates on appellant's system, rather than a remedy for any violation of the Florida statute.

Conditioned as appellant's Florida system of railroads was at that time, the rates there being already so low as not to leave any dividend to the stockholders, appellant insists that the result of this tariff is to take away its property without due process of law.

The Opinion in Case 156.

The court below stated in its opinion, page 33, record:

> "The respondent further fails to meet the burden of showing that the rate prescribed together with the other rates in force deprive the respondent of a right guaranteed by the Constitution of the United States. It is impossible to ascertain from this showing what may be the operating expenses or the value of the road in Florida. There are given figures to show that the total cost of construction, equipment, etc., of

> the road in Florida has been about fifteen and a half million dollars, but nothing to show what the depreciation has been nor what the present value is. * * * It seems that the respondent in operating its line through several States has a scheme of distributing its incomes and expenses according to States, but this scheme is not made clear to us, nor has it so divided its domestic and foreign business that we can say that the net earning of only 3½ per cent on the total cost of construction, equipment, etc., is a confiscation of its property, or in any wise an infringement upon its constitutional rights."

It is difficult to see how the court arrived at the conclusions here stated from the evidence before it. The annual report of the appellant does show the actual cost of construction of the road in Florida, page 57, record; it does show the bonded indebtedness and the capitalization of the Seaboard Air Line Railway, page 54, record; it shows in itemized detail the earnings from operation of the road within the State of Florida for the year ending June 30, 1904, page 61, record; and the operating expenses within the State, pages 65 and 66, record. No evidence was offered to contradict these figures, and they must therefore stand as a basis for computing the compensatory quality of the rates. In *Ames* v. *Union Pac. Ry. Co.* 64 Fed. Rep. 165, Mr. Justice Brewer says:

> "It is not easy to always determine the value of railroad property, and *if there is no other testimony in respect thereto* than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts."

The report further shows that after deducting the operating expenses and the taxes of the road in Florida from the gross earnings from operation within the State, there

is left a surplus of about $346,000; and we have pointed out that, on a reasonable apportionment of the accrued interest on the funded debt, this surplus becomes a deficit of over $430,000. With these figure before it we do not see how the court reached a conclusion—

> "that the respondent fails to meet the burden of showing that the rate prescribed, together with the other rates in force, deprive the respondent of a right guaranteed by the Constitution of the United States."

Our report covers operations for the year ending July 1, 1904. On that day the schedule lowering freights on "all household furniture, all we eat and wear," etc., went into operation. This will further reduce our future receipts and this order had been made before this suit began. Certainly the proposed reduction in rates on phosphates, a commodity which constitutes 16.43 per cent of the total freight tonnage hauled within the State, establishes at least a prima-facie case of confiscation within the meaning of the fourteenth amendment.

And further, the court below goes on to state:

> "There are given figures to show that the actual cost of construction, equipment, etc., of the road in Florida has been about fifteen and a half million dollars, but nothing to show what the depreciation has been nor what the present value is."

To this we reply—first, that the law raises no presumption that a going road depreciates; and, secondly, that pp. 56 and 57 (Record, 256) show, in detail, large amounts expended during the year for betterments; and this is the only evidence bearing on the question.

The court below further says:

> "It seems that the respondent in operating its line through several States has a scheme of distributing its incomes and expenses according to States, but this

scheme is not made clear to us, nor has it so divided its domestic and foreign business that we can say that the net earning of only 3½ per cent on the total cost of construction, equipment, etc., is a confiscation of its property or in any wise an infringement upon its constitutional rights."

In just what manner the court figured out a net income of 3½ per cent on the total cost of construction, equipment, etc., we are unable to discover. Certainly not on the business of the whole road—for that shows a net income of only one-half of one per cent; and it could not have been on the business of the road in Florida, which is, as we have shown, totally insufficient to pay its share of interest on the bonded debt.

As to dividing its domestic business, this is done in the report in detail, exactly according to the forms which presumably were furnished by the Florida Commission, which had the right to prescribe forms, and it was accepted by the Commission, for it was under the order of the court, record p. 31, formally admitted in evidence as "the annual report of the Seaboard Air Line Railway *filed* with the Railroad Commission."

Respectfully submitted,

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